NO. 49612-7

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

JESSICA L. WRIGLEY, individually and as Personal Representative for the Estate of A.C.A., Deceased, and O.K.P., a minor child, and I.T.W., a minor child, by and through their Biological Mother, Jessica Wrigley,

Appellants/Cross Respondents,

v.

STATE OF WASHINGTON, DEPARTMENT OF SOCIAL & HEALTH SERVICES, DONALD WATSON & "JANE DOE" WATSON, husband and wife, individually and the marital community thereof, ALESSANDRO LAROSA, & "JANE DOE" LAROSA, husband and wife, individually and the marital community thereof, RACHEL WHITNEY & "JOHN DOE" WHITNEY, husband and wife, individually and the marital community thereof, JENNIFER GORDER & "JOHN DOE" GORDER, husband and wife, individually and the marital community thereof; "JOHN DOE" Social Worker & "JANE DOE", Social Worker husband & wife individually and the marital community thereof, 1, through 5,

Respondents/Cross Appellants.

REPLY BRIEF OF RESPONDENTS

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I. INTRODUCTION

As a preliminary matter, this Court should not consider the new issue Plaintiffs raise in their reply brief: whether DSHS owes an actionable tort duty under RCW 13.34.030. Plaintiffs did not raise the issue at summary judgment or their opening brief and it is improperly before the Court.

Turning to DSHS's cross-appeal, this Court should enter summary judgment in favor of DSHS on cause-in-fact because Plaintiffs fail to raise a genuine issue of material fact to survive summary judgment on the issue. Specifically, Plaintiffs have not—and cannot—show that there was particular information DSHS was obliged to provide to the dependency court which, if the court had known it, would have caused the court to deny Mr. Viles's request for placement of Afton, under the legal standard applicable to denying a parent custody of his child. Instead, Plaintiffs rely on speculation and insufficient evidence, which is inadequate to survive DSHS's motion for summary judgment on cause-in-fact.

Finally, the opinions of Plaintiffs' standard of care expert should be stricken in two respects: the applicability of the Interstate Compact on the Placement of Children (ICPC) and the standard of care for DSHS social workers. Plaintiffs' expert concedes the ICPC is inapplicable to this case and her testimony shows that she does not understand how to determine the standard of care, thus her opinion is not helpful to the trier of fact.

II. ARGUMENT

A. This Court Should Reject Plaintiffs' Argument That DSHS Owes Them a Previously Unrecognized Duty Under RCW 13.34, Which They Raise for the First Time in Their Reply Brief

On reply, Plaintiffs for the first time argue that DSHS owed them a duty under RCW 13.34.030. Reply Brief of Appellants Response to Respondent's Cross-Appeal (Reply/Response) at 2-4. No actionable tort duty under RCW 13.34.030 has ever before been recognized in a published Washington appellate decision. However, Plaintiffs nonetheless ask this Court to find as a matter of first impression that the Legislature intended with RCW 13.34.030 to create an implied cause of action, invoking *Bennett v. Hardy*, 113 Wn.2d 912, 784 P.2d 1258 (1990). Reply/Response at 2-4. This issue is improperly before the Court for multiple reasons, and the Court should refuse to consider it.

First, consideration of the issue is barred by RAP 9.12, which provides that "[o]n review of an order granting or denying a motion for summary judgment the appellate court will consider only evidence and issues called to the attention of the trial court." DSHS was granted summary judgment by the trial court in this matter. CP at 1595-99, 1712-14. In response to DSHS's motion for summary judgment, Plaintiffs never alleged a duty under RCW 13.34.030 to investigate a biological parent absent a referral for abuse and neglect. CP at 985-1009, 1600-24. (Nor did Plaintiffs

seek to add such a claim when they moved to amend their complaint at the trial court level. CP at 1639-54.) Because Plaintiffs did not call this issue to the attention of the trial court on summary judgment, RAP 9.12 prohibits its consideration on appeal.

Second, the Court should not consider this issue on the additional ground that Plaintiffs are raising it for the first time in their reply brief. Washington courts decline to consider issues that a party fails to raise by an assignment of error and fails to support with legal argument in their opening brief. *McKee v. Am. Home Prod. Corp.*, 113 Wn.2d 701, 705, 782 P.2d 1045 (1989) ("We will not consider issues on appeal that are not raised by an assignment of error or are not supported by argument and citation of authority."); *Jackson v. Quality Loan Serv. Corp.*, 186 Wn. App. 838, 845-46, 347 P.3d 487 (2015), *review denied*, 184 Wn.2d 1011 (2015) (an appellate court will not consider a claim of error that a party fails to support with legal argument in an opening brief).

Finally, if the Court were to take up Plaintiffs' newly raised duty issue, DSHS requests the opportunity to file briefing in opposition.

B. DSHS is Entitled to Prevail on Causation Because Plaintiffs Fail to Establish a Genuine Issue of Material Fact on Cause-in-Fact to Survive Summary Judgment

While the trial court properly dismissed Plaintiffs' claims on summary judgment because DSHS "did not owe a duty to Plaintiffs" (CP at

1598), DSHS is also entitled to summary judgment on the independent basis that no reasonable trier of fact could find that cause-in-fact exists. Cause-in-fact is not established because Plaintiffs fail to identify any evidence that, if it had been presented to the dependency court, would have caused the judge to deny Mr. Viles placement of Afton under the legal standard applicable to denying a parent custody of his child. *See* Br. of Respondents at 40-48.

Plaintiffs contend that if DSHS had provided the dependency court with certain information, primarily allegations by Mrs. Wrigley that Mr. Viles was violent, the court would have denied placement. Reply/Response at 13-17. Plaintiffs' argument fails for three reasons: it is based on a flawed conception of both DSHS's and the court's authority in dependency matters, Washington law requires more than mere speculation to establish cause-in-fact, and the speculative nature of their factual assertions fails to establish a genuine issue of material fact. Because no reasonable trier of fact could find that cause-in-fact exists, this Court should grant DSHS's motion to dismiss Plaintiffs' complaint for failing to establish causation. *Hansen v. Friend*, 118 Wn.2d 476, 479, 824 P.2d 483 (1992).

1. Plaintiffs misunderstand the constitutional limits on the authority of DSHS and the dependency court to intervene in the parent-child relationship

Plaintiffs contend that DSHS should have thoroughly investigated Anthony Viles's background and his ability to care for Afton prior to the dependency court's January 30, 2012, hearing. However, Plaintiffs fail to point to any authority that would have allowed DSHS to investigate Mr. Viles, Afton's biological parent, absent a referral for abuse and neglect under RCW 26.44, which did not exist. A parent is presumed to be fit and capable of parenting. *In re Brown*, 153 Wn.2d 646, 650, 105 P.3d 991 (2005). Indeed, the Constitution specifically protects a biological parent's custody rights and right to familial association with their child. *In re Custody of Smith*, 137 Wn.2d 1, 13, 969 P.2d 21 (1998) (citing *Prince v. Massachusetts*, 321 U.S. 158, 166, 64 S. Ct. 438, 88 L. Ed. 645 (1944)); *see also* RCW 13.32A.010 ("absent abuse or neglect, parents have the right to exercise control over their children").

Plaintiffs' first error—misunderstanding the limits on DSHS's authority to investigate biological parents—leads to a second error; misunderstanding the dependency court's authority to deny Mr. Viles's request for placement of Afton with him. The dependency court is required to "release a child" to the custody of the parent unless it "finds there is reasonable cause to believe" that either there is no parent able to care for

the child or the release of the child to the parent would present "a serious threat of substantial harm to such child[.]" RCW 13.34.065(5)(a).[1] Consequently, the dependency court here was required to release Afton to Mr. Viles unless the court—at the time—had reasonable cause to believe that Mr. Viles either was unable to care for Afton or presented a serious threat of substantial harm to him. Because such evidence did not exist, the dependency court was legally bound to grant Mr. Viles's motion for placement of Afton.

2. To establish cause-in-fact, Washington law requires more than mere speculation that the dependency court might have denied placement of Afton with Mr. Viles

To establish cause-in-fact, a plaintiff must provide evidence that some act or omission of the defendant produced injury to the plaintiff in a direct, unbroken sequence under circumstances where the injury would not have occurred "but for the defendant's act or omission." *See* 6 Karl B. Tegland, *Washington Practice: Pattern Jury Instructions: Civil* § 15:1, at 196 (6th ed. 2012); *Hartley v. State*, 103 Wn.2d 768, 778, 698 P.2d 77 (1985). Cause-in-fact "does not exist if the connection between an act and the later injury is indirect and speculative." *Estate of Bordon v. Dep't of Corr.*, 122 Wn. App. 227, 240, 95 P.3d 764 (2004), *review denied*, 154

[1] There are other impediments to custody, which are not relevant in this case. *See* RCW 13.34.065(5)(a).

Wn.2d 1003 (2005) (reversible error to submit speculative causation theory to the jury).[2]

Estate of Bordon is the controlling law as it directly addresses the proof necessary to establish cause-in-fact in a negligence case. *Bordon*, 122 Wn. App. at 240 ("Cause-in-fact does not exist if the connection between an act and the later injury is indirect and speculative."). Plaintiffs contend that *Bordon* is "inapposite." Reply/Response at 15. However, it is directly on point. In *Bordon*, a negligent parole supervision case, the Court of Appeals held cause-in-fact was not established because the plaintiff failed to present evidence as to "whether a judge would have done something differently if he or she had known about the violation and what that different result would have been." *Bordon*, 122 Wn. App. at 241-42. This lack of evidence "left gaps in the chain of causation" which would require the jury to improperly speculate as to the outcome. *Id.* at 241. Similarly, in this case, Plaintiffs have failed to provide any evidence beyond speculation that additional information, if provided to the dependency court, would have changed the court's placement decision.

[2] *See also Ma'ele v. Arrington*, 111 Wn. App. 557, 564, 45 P.3d 557 (2002) (testimony that something *could* have been a cause forces the jury to impermissibly speculate); *Miller v. Likins*, 109 Wn. App. 140, 146-47, 34 P.3d 835 (2001) (evidence that defendant's actions *might* have caused plaintiff's harm can only be characterized as speculation or conjecture); and, *Rasmussen v. Bendotti*, 107 Wn. App. 947, 959, 29 P.3d 56 (2001) (speculation is not sufficient to establish proximate cause).

Not germane to *Bordon*'s analysis of cause-in-fact and speculation are the two cases relied on by Plaintiffs: *Beal v. City of Seattle*, 134 Wn.2d 769, 954 P.2d 237 (1998), and *Ayers v. Johnson & Johnson Baby Prods. Co.*, 117 Wn.2d 747, 818 P.2d 1337 (1991). Reply/Response at 15-17. The legal issue in *Beal* involves the public duty doctrine and the express assurance exception to that doctrine. *Beal*, 134 Wn.2d 769. Notably, that exception is not at issue in this case, contrary to Plaintiffs' claim that this case "also deal[s] with a special relationship exception to the public duty doctrine." Reply/Response at 16. It does not. The express assurance "special relationship" exception to the public duty doctrine is not the same as the common law special relationship duty recognized in *HBH v. State*, 197 Wn. App. 77, 387 P.3d 1093 (2016), *review granted*, No. 94529-2, which Plaintiffs allege applies to DSHS in this case. Reply/Response at 6-8.

The primary thrust of the *Beal* decision is the Supreme Court's analysis of the scope of the express assurance exception and when a breach of that duty has occurred. *Beal*, 134 Wn.2d at 785-87. The only analysis the *Beal* court conducted on cause-in-fact was to state that the facts of that case were sufficient to establish cause-in-fact; i.e. that but for the municipality's failure to provide police protection as promised, the victim may not have

been murdered.[3] *Beal* does not consider what evidence is necessary to establish cause-in-fact, nor what evidence would or would not be considered too speculative to establish it. *Id.* at 787. Thus, *Beal* does not provide guidance regarding the legal rule governing cause-in-fact and speculation.

Beal is additionally inapposite here because its facts are in no way similar to the facts in this case. No express assurances were made by DSHS, or any of its social workers, to the dependency court (or the Wrigleys) that Afton would be safe in Mr. Viles's care. Indeed, quite the opposite. During the January 30, 2012, hearing, AAG Collins explained that DSHS had "no statutory authority or resources to do a full assessment" of the placement. CP at 300. Thus, while AAG Collins indicated that DSHS had no concerns based on the knowledge it did have, she stated on behalf of DSHS that "we're unable to ensure the safety of the child."[4] CP at 300.

Ayers, a products liability failure to warn case, is likewise inapposite. Mrs. Ayers sued for the death of her baby who aspirated baby oil. *Ayers*, 117 Wn.2d at 750. The issue on cause-in-fact was whether a

[3] In *Beal*, a victim called 911 for assistance with a civil standby at her violent ex-husband's apartment. *Beal*, 134 Wn.2d at 773. The 911 operator told the victim she would send police and the victim then stated because of that she would wait outside for the police to arrive. *Id*. at 774. The ex-husband then killed the woman as she waited outside. *Id.* However, police had never been dispatched to the civil standby despite the 911 operator's express assurance that she was sending assistance. *Id.*

[4] AAG Collins' colloquy with the dependency court is discussed further in section II.B.3.a, below.

warning label on the baby oil would have caused Mrs. Ayers, and the other members of the Ayers' family, to keep the oil out of the baby's reach. *Id.* at 753. The court found that both Mrs. Ayers and other members of the family testified directly that they would have kept the oil out of the baby's reach if they had been aware of the danger of aspiration. *Id.* at 753-54. Based on this testimony, the court found that the jury could have decided the issue of cause-in-fact in the plaintiffs' favor, as the jury reasonably could have believed the testimony. *Id.* at 754.

Contrary to the evidence presented in *Ayers*, the Plaintiffs here presented no direct or expert testimony establishing that the dependency court would have made a different decision on placement if it had been presented with additional information. In order to draw such a conclusion, one would have to speculate about the court's decision-making process, which would be improper. *Bordon*, 122 Wn. App. at 241-42. Thus, the cases relied on by Plaintiffs only reaffirm their failure to establish cause-in-fact.

3. Plaintiffs' speculation that the dependency court would have made a different placement decision is insufficient to establish cause-in-fact

Applying *Bordon,* Plaintiffs are required to provide non-speculative evidence showing that DSHS failed to provide particular additional information to the dependency court, and if that information had been provided it would have changed that court's decision regarding placement

of Afton with Mr. Viles. In other words, Plaintiffs must identify specific information that they allege DSHS should have provided to the dependency court, and offer evidence that the information would have been sufficient either to overcome the presumption of Mr. Viles's fitness to take custody of Afton or to convince the dependency court that Mr. Viles posed "a serious threat of substantial harm" to Afton. RCW 13.34.065(5)(a).

Plaintiffs argue that this burden is met by what they allege were AAG Collins' misrepresentation of facts to the dependency court and social worker Don Watson's failure to advise the court of Mrs. Wrigley's concerns. Reply/Response at 11-14. Plaintiffs contend that if the dependency court had been advised of what they allege Collins and Watson should have told it, "a jury could find that the court would not have sent [Afton] to Idaho at that point." Reply/Response at 17. However, Plaintiffs misconstrue the testimony given to the dependency court and base their conclusion on pure speculation.

a. AAG Collins did not misrepresent facts to the dependency court

As Plaintiffs correctly point out, AAG Collins' position at both dependency proceedings was that DSHS "cannot make a fully informed recommendation one way or another." Reply/Response at 11; CP at 299. Plaintiffs erroneously construe this to have been an abdication of DSHS's

duty to protect Afton. Reply/Response at 11. To the contrary, AAG Collins was making a factual statement about the limits on DSHS's authority, given the situation. Generally, when a child's placement occurs out of state, the placement process would be subject to the Interstate Compact on the Protection of Children (ICPC). CP at 299. However, as AAG Collins pointed out to the dependency court at the time, a then-recent Court of Appeals decision had "found that ICPC does not apply to out-of-state placements where the child has not been found dependent as to the out-of-state parent[.]"[5] CP at 299-300. Accordingly, AAG Collins explained to the dependency court:

> The Department's position as to Mr. Viles is that the ICPC doesn't apply at this point. The Department has *no statutory authority or resources* to do a full assessment. The Department, therefore, can't make a fully informed recommendation.
>
> . . . [B]ecause we haven't been able to do a full investigation, we're unable to ensure the safety of the child.

CP at 300 (emphasis added).

As for Plaintiffs' contention that "the AAG misled the court by stating… 'the Department has no other concerns,'" (Reply/Response at 11 (quoting CP at 300)), the dependency court was informed by DSHS, through its counsel, of the context in which AAG Collins's statement was

[5] Although a shelter care petition had been filed regarding Afton, Mrs. Wrigley sought multiple continuances, which resulted in there being no dependency determination for Afton prior to his placement with Mr. Viles. CP at 42, 172.

made. As AAG Collins explained to the court, the statement was made without the benefit of DSHS being able to conduct a full assessment of the safety of Mr. Viles's home. And DSHS expressly disavowed its ability to ensure Afton's safety. CP at 299-300. There was no misrepresentation of the facts by the AAG to the dependency court.

b. DSHS had no obligation to express Mrs. Wrigley's concerns to the dependency court

Plaintiffs also allege that DSHS should have conveyed Mrs. Wrigley's concerns about Mr. Viles's past violent behavior to the dependency court. Reply/Response at 14. Such an argument is simply an irrational hook for liability. Contrary to Plaintiffs' assertion, DSHS did not "control the flow of information to the court" regarding Mrs. Wrigley's concerns. Reply/Response at 14. While DSHS's AAG and social worker were present at both dependency court hearings, so too were Afton's Guardian ad Litem[6], Afton's therapist, Mr. Viles and his attorney, and, most importantly, Mrs. Wrigley's attorney. CP at 292, 332. Moreover, as the plaintiff in the dependency proceeding, Mrs. Wrigley had a right to attend the hearings, although she did not attend either one.

Moreover, Mrs. Wrigley, either directly or through her attorney, was in the best position to present her concerns about Mr. Viles's alleged violent

[6] Ms. Gones, Afton's Guardian ad Litem, was only present at the first hearing on January 30, 2012. CP at 292, 332.

tendencies to the dependency court, not DSHS. Only Mrs. Wrigley could testify from direct personal knowledge about her allegations of having been the victim of those tendencies. It should not be the burden of DSHS to provide another party's evidence and concerns in an adversarial proceeding, especially when that information is not in the sole possession of DSHS, and is in fact direct testimony from a parent. DSHS should not be required to advocate the position of the parent if the parent chooses not to do so him/herself.

c. Plaintiffs have presented no evidence of what DSHS would have found if it conducted a more thorough assessment of Anthony Viles

Not only did DSHS not have authority to conduct a thorough assessment of Mr. Viles in the context of the dependency process, Plaintiffs have presented no evidence that DSHS would have found any information in such an assessment that would have changed the dependency court's placement decision. In order to survive summary judgment on cause-in-fact, Plaintiffs must present evidence sufficient to establish an issue of genuine material fact that DSHS would have discovered evidence regarding Anthony Viles *sufficient to change the dependency court's decision* on placement. As DSHS pointed out in its opening brief on cross-appeal, there is no evidence that Mr. Viles had ever abused a child or was abusing Afton

prior to the dismissal of the dependency petition. Br. of Respondents at 47-48.

Plaintiffs make no attempt to address this lack of evidence. Instead, they again raise the irrelevant issue of whether DSHS had an independent statutory duty to investigate Mr. Viles under RCW 13.34. Reply/Response at 17. That issue is not properly before this Court.[7]

d. Plaintiffs have presented no evidence that new or different information would have changed the dependency court's placement decision

Finally, in order to defeat DSHS's summary judgment motion on cause-in-fact, Plaintiffs have to prove that the new or different information they allege DSHS should have provided to the dependency court, discussed above, would have given the dependency court a sufficient basis to deny Mr. Viles's constitutional right to placement of his child. The only evidence Plaintiffs have presented along these lines is to quote dicta from a negligent investigation case stating: '"There is little question that courts rely heavily on the judgment of CPS caseworkers in making dependency determination.'" Reply/Response at 11 (quoting *Tyner v. Dep't of Soc. & Health Servs.*, 141 Wn.2d 68, 87, 1 P.3d 1148 (2000)).

[7] As explained above, this issue is not properly before the Court because Plaintiffs did not call it to the trial court's attention on summary judgment as required by RAP 9.12 and also because they did not raise it in their opening brief. *See*, *supra*, section II.A.

However, as explained above, Plaintiffs offer no evidence to prove that additional negative information would have come to light if DSHS did a fuller assessment of Mr. Viles. The only additional information that Plaintiffs argue DSHS should have provided to the trial court were Mrs. Wrigley's concerns. Reply/Response at 12-14, 17. But Plaintiffs have provided no expert or other testimony that this information would have changed the dependency court's placement decision. Consequently, the jury would have to speculate about the dependency court's decision in order to fill in the gaps in the causal chain, which *Bordon* found was inappropriate. Because Plaintiffs have not established a genuine issue of material fact on cause-in-fact, DSHS is entitled to summary judgment on proximate cause.

C. The Trial Court Erred in Failing to Strike the Opinion of Plaintiffs' Expert Sonja Ulrich

On summary judgment, DSHS moved to strike the opinion of Plaintiffs' standard of care expert, Sonja Ulrich, in its entirety. On appeal, DSHS limits its request to strike to two portions of Ms. Ulrich's opinion: (1) that the ICPC is applicable and is a guideline for the situation related to this case; and (2) that DSHS fell below the standard of care in failing to obtain records from Idaho regarding Mr. Viles. These aspects of Ms. Ulrich's opinion should be stricken as she concedes ICPC does not apply in this case and her testimony establishes she does not understand the

applicable standard of care and thus is not qualified to opine on it.

1. Plaintiffs and Ms. Ulrich concede ICPC was not applicable to placing Afton out of state with his biological parent Mr. Viles

Plaintiffs, quoting Ms. Ulrich, concede that the ICPC was not applicable to a biological parent, such as Mr. Viles in this case. Reply/Response at 18 (quoting CP at 966).[8] Ms. Ulrich additionally conceded the point in her deposition testimony, stating "ICPC doesn't pertain." CP at 1061.

2. Ms. Ulrich's unfamiliarity with the concept of "standard of care" and inability to properly identify the standard of care applicable to DSHS social workers in a negligence case undermines her "expert" testimony on this point

Relying on Ms. Ulrich's opinion, Plaintiffs argue that using the ICPC as a template and searching for the Idaho records was the standard of care applicable to DSHS in this matter. Reply/Response at 20. However, Ms. Ulrich demonstrated that she was not qualified to offer an expert opinion on the applicable standard of care in this case when she was unfamiliar with the very concept of "standard of care" and then, after it was defined for her, erroneously equated it with "best practices," which is the

[8] Plaintiffs' briefing states: "Plaintiffs do not dispute that the ICPC is applicable to a biological parent, such as Mr. Viles in this case." Reply/Response at 18. The remainder of the paragraph, including Plaintiffs' quote from Ms. Ulrich's direct testimony, clarify that Plaintiffs mean the ICPC is inapplicable, as they plainly state "the ICPC would not be applicable to the case involving [AA]." Reply/Response at 18 (quoting CP at 966).

wrong standard.

In order for an expert opinion to be admissible, it must be helpful to the trier of fact. ER 702. Ms. Ulrich's lack of familiarity with the term "standard of care" and her inability to distinguish between the standard of care for negligence, which is ordinary care, versus what would be optimal, *i.e.*, best practices, makes her opinion unhelpful to the trier of fact.

When asked how she determined the standard of care, Ms. Ulrich expressed her lack of familiarity with the term:

> Q: . . . So how do you go about determining exactly what the standard of care is?
>
> A: I'm not sure I understand your question because now you're taking me back to this whole standard of care definition, which is something I wasn't familiar with until I came here.
>
> So I'm not really clear. When you say "standard of care," I don't understand what that means for you.

CP at 1060.

After "standard of care" was defined for her, Ms. Ulrich erroneously identified the applicable standard of care as a "best practice" standard:

> Q: Well, how do you determine what policies and procedures the social workers are required to comply with in order to determine whether or not they have violated what we call the standard of care, professional conduct?
>
> A: Okay. Well, I would say that, if I'm understanding your question correctly, so hopefully I am, that, when I look at the policies, we look at best practice standards.

CP at 1060. But best practice is not the correct standard to consider when evaluating the standard of care in a negligence case.

Negligence, the standard in this case, is the failure to exercise ordinary care. 6 Karl B. Tegland, *Washington Practice, Pattern Jury Instructions: Civil* § 10:01 (6th ed. 2012); *Mathis v. Ammons*, 84 Wn. App. 411, 415-16, 928 P.2d 431 (1996). When determining whether a state agency has been negligent, Washington law looks to the applicable agency standard. Thus, in cases such as this, the jury is asked to consider the ordinary custom and practice of social workers to determine whether the standard of care has been met. *Swartley v. Seattle Sch. Dist. No. 1,* 70 Wn.2d 17, 21, 421 P.2d 1009 (1966).

Ms. Ulrich conceded at her deposition that there were no agency policies or standards directly related to placement of a child with an out-of-state parent. "If you're talking about whether or not there's a policy that speaks to out-of-state parents specifically, no, there's not." CP at 1062. Nor is there any policy requiring a check of another state's records:

> Q: But those safety and risk assessments don't say you have to do -- you have to check with the history of the child welfare department where the parent lives; right?
>
> A: Not that I'm aware of.

CP at 1063.

Indeed, Ms. Ulrich appeared to base her entire expert opinion on the one case she worked on that was similar. CP at 1066. "Where negligence is in issue, the usual conduct or general custom of others under similar circumstances is relevant and admissible, [but] such custom may not be established by evidence of conduct of single persons or businesses." *Swartley*, 70 Wn.2d at 21; *Miller v. Staton*, 58 Wn.2d 879, 885, 365 P.2d 333 (1961). Ms. Ulrich's one case is insufficient to establish the standard of care for DSHS social workers.

Because these deficits render Ms. Ulrich's opinion unhelpful to the trier of fact, her opinion as to these two issues should be stricken.

D. Plaintiffs' Appeal to Common Sense Is Simply Not Applicable

Finally, Plaintiffs attempt to argue that common sense should dictate certain actions take place. Reply/Response at 20. However, DSHS social worker actions are guided by policy and procedure, not "common sense" or what any individual social worker thinks is the right course of action. The standard of tort liability cannot be measured against one person viewing a situation in hindsight.

> A person is negligent if he does an act which a person of ordinary prudence would not have done under the same or similar circumstances. It is not the result of the act that is controlling, nor is the conduct to be judged by what, after injury has occurred, then appears would have been a proper precaution.

Severns Motor Co. v. Hamilton, 35 Wn.2d 602, 604, 214 P.2d 516 (1950). Plaintiffs' argument regarding the dictates of "common sense" is inapposite.

III. CONCLUSION

For the reasons explained above, and in DSHS's previous briefing on cross-appeal, this Court should grant summary judgment to DSHS on cause-in-fact and dismiss Plaintiffs' claims with prejudice. The Court should also strike the identified portions of Ms. Ulrich's expert opinion.

RESPECTFULLY SUBMITTED this 7th day of December, 2017.

s/Allison Croft
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DECLARATION OF FILING AND SERVICE

I declare that on December 7, 2017, I electronically filed the foregoing document in the Washington Court of Appeals, Division II and served a copy of the foregoing on:

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I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

s/Jodi Elliott
JODI ELLIOTT, Legal Assistant

ATTORNEY GENERAL'S OFFICE, TORTS DIVISION

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